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IN THE

Supreme Court of the United States

October Term, 1971

GABRIELA F. PHILLIPS, as Administratrix of the Estate of WILLIAM STANTON PHILLIPS, Deceased,

Petitioner,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, a National Banking Association,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, GABRIELA F. PHILLIPS, as Administratrix of the Estate of WILLIAM STANTON PHILLIPS, Deceased, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court entered on March 22, 1971, which affirmed the judgment of the United States District Court for the Southern District of New York granting defendant's motion for summary judgment, made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The opinion of the United States District Court has not been reported, and is appended hereto.

The opinion of the United States Court of Appeals for the Second Circuit is not as yet reported and is appended hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1971. No rehearing was sought by petitioner.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

1. Respondent, a National Banking Association, having its main office at New York, operates a foreign branch at Montevideo, Uruguay, under the provisions of 12 U.S.C. secs. 601-604a.

A sight draft issued at Montevideo to Petitioner's decedent, drawn by Respondent on Respondent in New York, is physically located and in the possession of Respondent at its Montevideo branch.

Is presentment of the sight draft, which is now in Respondent's physical possession at its Montevideo branch, at Respondent's office in New York required as a condition for payment under the separate entity theory established under the provisions of 12 U.S.C. sec. 604, heretofore applied only in transactions directing payment at a foreign branch?

2. Does the separate entity theory between a na-

tional bank and its foreign branch, applied under the provisions of 12 U.S.C. sec. 604, prevent Petitioner from proving the execution and contents of a sight draft in New York by secondary evidence, Respondent refusing to produce the sight draft or a photocopy thereof?

3. Does the separate entity theory between a national bank and its foreign branch, applied under the provisions of 12 U.S.C. sec. 604, permit Respondent to refuse authorization to its foreign branch to issue a "Second of Exchange" of a sight draft issued by its foreign branch in the form of a "bill in a set" bearing the words "Pay at sight against this First of Exchange (Second of Exchange unpaid)," thereby causing Petitioner's demand for payment at New York to be rejected upon the ground that no presentment of the First of Exchange has been made at its New York office?

STATUTES INVOLVED

The statute involved in the case at bar is Section 604, of Title 12 of the *United States Code*, which reads as follows:

> "Sec. 604. *Accounts of foreign branches; profit and loss.*
>
> Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

STATEMENT OF THE CASE

This is an action filed on December 28, 1964 by petitioner's predecessor on a complaint for money, against Respondent; the original complaint was filed by Floyd H. King as Administrator of the Estate of William Stanton Phillips, deceased, Petitioner having been substituted as administratrix during the pendency of this action. Floyd H. King is a citizen of the State of California, Petitioner is a citizen of Peru, residing in California, and Respondent is a citizen of the State of New York.

Jurisdiction of the United States District Court for the Southern District of New York was invoked under the provisions of section 1332, Title 28 of the *United States Code*, and jurisdiction of the United States Court of Appeals for the Second Circuit was invoked under the provisions of section 1291, Title 28 of the *United States Code*.

In July 1959, William Stanton Phillips, a citizen of the United States and a resident of the State of California, visited Montevideo, Uruguay, on a pleasure trip with his mother Helen Ham Phillips, who, on July 29, 1959 purchased at the Montevideo branch of Respondent First National City Bank of New York, a sight draft issued in the form of a "bill in a set" and bearing the words "Pay at sight against this First of Exchange (Second of Exchange unpaid) the sum of $30,000.00," drawn upon and payable at Respondent's head office in New York to William Stanton Phillips. (Page 223a of the Appendix; pages 101a-106a and 164a of the Appendix) (References are made to the Appendix filed in the Court of Appeals.)

The sight draft was handed by the cashier to William Stanton Phillips. William Stanton Phillips died in Montevideo, Uruguay, on August 3, 1959.

William Stanton Phillips had opened a safe deposit box at Respondent's Montevideo branch on June 4, 1959 (Page 64a and 76a of the Appendix).

On October 7, 1959 Petitioner's attorney advised Respondent at its Montevideo branch of the death of William Stanton Phillips and requested information concerning the whereabouts of the sum of $31,000.00, with a copy of the letter to Respondent's head office in New York. (27a, 28a)

On November 13, 1959 Petitioner's attorney again addressed a letter to Respondent's branch office in Montevideo inquiring about the assets standing in the name of William Stanton Phillips, deceased.

On December 15, 1959 an answer was received by Petitioner's attorney from Respondent's New York office advising of the issuance of the $30,000.00 draft and further advising that there were two accounts at the Montevideo branch standing in the joint names of Helen Ham Phillips and/or William Stanton Phillips. (31a)

No information was supplied either to the United States Consul at Montevideo, or to Petitioner, or Petitioner's attorney of the existence of a safe deposit box standing in the name of William Stanton Phillips.

After appointment of Floyd H. King, Petitioner's predecessor, as Administrator of the Estate of Wil-

liam Stanton Phillips, deceased, in California, Petitioner's attorney again advised Respondent's branch office in Montevideo that Petitioner was extremely anxious to receive information concerning the status of monies held by Respondent. In response to this inquiry, Respondent's Montevideo branch through J. P. Moran, submanager, by letter dated December 30, 1959, advised Petitioner's attorney that this matter was being handled by Respondent's head office in New York and to address all further correspondence to D. A. Campbell, assistant cashier, at Respondent's head office in New York. (32a and 33a)

All further correspondence concerning the subject matter of this action was had between Petitioner and Respondent's head office at New York and its New York attorneys as requested by the Respondent's Montevideo branch. (34a-63a)

Petitioner was informed by Respondent that the draft was missing, and was not informed or advised of the existence of the safe deposit box standing in the name of William Stanton Phillips at Respondent's Montevideo branch.

On July 27, 1962 Respondent through its attorneys offered to issue a "Second of Exchange" stating that such a draft "could be sent to the bank here for payment . . ."

On July 14, 1964 Respondent's attorney at New York advised Petitioner's attorney that the safe deposit

box standing in the name of the deceased had been opened and that the contents therefrom included the First of Exchange in the sum of $30,000.00, which had never been endorsed or negotiated, payable to the deceased at Respondent's head office in New York. (58a, 59a)

On December 15, 1964 Petitioner's attorney requested Respondent to issue a Second of Exchange.

This request was not answered by Respondent, and no reason was stated in any other correspondence why a Second of Exchange was not issued or could not be issued by Respondent.

Respondent has refused to pay to Petitioner the proceeds of the draft or to issue a Second of Exchange to conclude the transaction.

On December 28, 1964 Petitioner filed the present complaint for the recovery of the funds held by Respondent with interest thereon at the rate allowed by law from October 7, 1959, the date when the first demand was made therefor.

Helen Ham Phillips, mother of the deceased, died in June of 1966. Neither Helen Ham Phillips, the conservator of her estate during her life, or the executor of her estate, have either intervened in the present action, nor have they filed a separate action for the recovery of any of the proceeds of the bill of exchange,

nor did Respondent file in the instant action, proceedings authorized by Sec. 216 of Volume 7B of the *Civil Practice Law and Rules of New York* authorizing and requiring notice of the action on any person claiming any part of the proceeds of the action. The Statute of Limitations for any intervention by heirs of the estate of Helen Ham Phillips, deceased, under the provision of sec. 213 of Volume 7B of the *Civil Practice Law and Rules of New York* has expired, leaving Petitioner as the only person making a claim against Respondent bank for the proceeds of the bill of exchange payable to Petitioner's deceased.

In accordance with the provisions of the First of Exchange, the *funds* of $30,000.00 were transmitted to Respondent's head office *in New York* for payment on or about the date of the issuance of the draft on July 29, 1959.

28 *U.S.C.* Sec. 604 states in part as follows:

> "Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, . . ."

This statute was interpreted by the United States District Court, as reported in the opinion of Hon. John M. Cannella, United States District Court Judge, as follows:

> "Section 134 of the NIL states that the instrument 'must be exhibited to the person from whom payment is demanded, and when it is paid must

be delivered up to the party paying it.' Although a draft drawn on oneself may, in effect, be a promissory note or an accepted bill and thus make presentment or acceptance unnecessary to charge the *drawer* with *liability*, such is not the case herein. Technically, two separate and distinct banks are involved — one operating in compliance with Uruguayan law and the other in compliance with New York law. Thus, this draft was not one drawn by the defendant, which is the *drawee*, and presentment is therefore required according to the general rule." (Emphasis by the Court.)

The Court of Appeals adopted the reasoning of the United States District Court, and states in its opinion as follows:

"Since plaintiff concededly does not have the sight draft, which is still in Uruguay, Judge Cannella granted summary judgment. The judge left open the possibility that at some future time the Bank might be liable to pay plaintiff, if she established the right to possession of and title to the draft.

We affirm the order of the court below, but we must disavow any implied approval of the conduct of all the parties to date."

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Has Decided an Important Question of Federal Law of First Impression Which Has Not Been, But Should Be, Settled By This Court.

Limiting the issue presented by this Petition to the

single question relating to the interpretation of Sec. 604 of Title 12 of the *United States Code*, not a single precedent could be found in diligent search extending from its enactment as the Act of December 23, 1913 to its present Amendments, which has interpreted this act, where a transaction originating at a foreign branch of a national bank requires payment at the office of the national bank in the United States.

The law is settled and the separate entity theory between a national bank and its foreign branch has consistently been applied to transactions originating at the office of the national bank in the United States requiring payment at its foreign branch office.

To adopt the separate entity theory established by the Act of December 23, 1913 to transactions originating in a foreign country requiring payment within the United States would be in derogation of the basic aims of this act which is the protection of trade relations with foreign governments by American investors, and would invalidate well-estabished principles of law in the field of negotiable instruments. Both the United States District Court and the Court of Appeals have based their decision upon the assumption in the case at bar that the separate entity theory precludes payment of a sight draft issued by a national bank upon itself and therefore not requiring presentment *to the extent* that (1) secondary evidence is not admissible to prove due execution and the contents of the draft which is in the possession of the bank, (2) that issuance of a Second of Exchange cannot be required although the national bank controls the operation of its foreign branch wherever such operation is not in conflict with foreign law, there being no evidence of such

foreign law, which has neither been pleaded nor proven for the purpose of the motion for summary judgment and (3) the well-established principle that a draft drawn by one person upon itself is an accepted bill, accepted by the act of issuing it, and not requiring presentment, may not be applied.

It is respectfully submitted that an interpretation of Sec. 604 of Title 12 of the *United States Code* by this Court is necessary as affecting the broad field of commercial transactions originating at a foreign branch office of a national bank and requiring performance within the United States.

The issue is alluded to, but was not decided, in *United States vs. First National City Bank*, 2 Cir., 321 F. 2d 14 in which the Internal Revenue Service moved for an injunction, enjoining the transfer of funds held by the Respondent bank's foreign branch for the account of a taxpayer.

The Court affirmed the injunction issued by the United States District Court, except as to any deposit *held abroad and collectible only outside the United States.*

Affirming the separate entity theory, *insofar as it relates to attempted attachments in New York of monies deposited in a foreign branch bank*, the Court states at page 21 as follows:

> "The Government seeks to vitiate the effect of these cases by contending that they relate merely to state-imposed restrictions upon the remedy of a creditor of a depositor, stressing the fact that *none of these cases involved an actual attempt by*

a depositor to demand payment in New York of a deposit made in a branch bank abroad.

Varga vs. credit-Suisse, 2 A.S. 2d 596, 157 N.Y.S. 2d 391 (1st Dep't 1956) is urged by the Government as authority for the proposition that a depositor may sue a New York branch of a foreign bank with respect to an account in another foreign branch of the bank. However, that case involved a suit for breach of contract arising out of the alleged wrongful transfer of funds deposited in a Hungarian branch. The sole question decided there was that Sec. 200, subd. 3 of the New York Banking Law, did not prevent a suit against an agent of a foreign bank in New York where the cause of action arose outside of New York. In addition, although the question was not reached by the court, it is possible that the action might be governed by the rule of Sokolof v. National City Bank, 239 N.Y. 158, 145 N.E. 917, 37 A.L.R. 712 (1924), which permitted an action against the main office where payment had been refused at a branch office. *Here, since the funds had allegedly been transferred no demand would even be necessary.* C.F. Sokolof v. National City Bank, 250 N.Y. 69, 80-81, 164 N.E. 745, 749 (1928)." (Emphasis added)

In accordance with the terms of the draft involved in the case at bar the Montevideo branch of the bank transmitted $30,000.00 to its main office in New York on July 29, 1959 under established banking law, anticipatory to the demand for payment of the draft, and the bank has had the sum of $30,000.00 in its possession in New York subject to the order of the

named payee or its successor in interest. The draft has never been negotiated and has never been endorsed.

The interpretation of Sec. 604 of Title 12 of the *United States Code* by the United States District Court and Court of Appeals in the case at bar leaves Petitioner without remedy and renders the courts powerless to deal with a national bank which refuses to take any steps toward payment of its obligation.

This dilemma is best illustrated by the opinion of the Court of Appeals for the Second District which states in part as follows:

> "We affirm the order of the court below, but we must disavow any implied approval of the conduct of all the parties to date. As a result of the inability of the contending interests to agree on a settlement, the $30,000 has remained with the Bank for almost 12 years although the Bank concedes that someone is entitled to it. We would suggest that it is incumbent upon the Bank now to do more than sit back and leave the contending estates to their quarrel. Apparently both are amenable to judicial process in California, and the Bank should explore all further possible affirmative steps under state, federal or foreign law to obtain a judicial ruling as to which group is entitled to the $30,000 proceeds."

The United States District Court has precluded Petitioner to establish "the right to possession of and title to the draft," by established judicial procedure, and the United States Court of Appeals has affirmed

the judgment of the United States District Court without however rendering any solution.

It is respectfully submitted that the problem rests in the interpretation of Sec. 604 of Title 12 of the *United States Code*, limiting the right of Petitioner to such an extent that she is not permitted to prove ownership, the right to possession of the monies on deposit in New York, or even the existence of the sight draft in possession of the national bank by secondary evidence.

The revised draft of Proposed Rules of Evidence for the United States Courts, published on April 12, 1971 in 437 Fed. 2d No. 3 reads in part as follows:

"

Rule 1004.

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if —

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the

hearing, and he does not produce the original at the hearing; or

(4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Advisory Committee's Note

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. . . . .

Paragraph (2) When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

Paragraph (2) A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule

is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

The limiting interpretation of the separate entity theory in transactions requiring performance in the United States is contrary to the basic aims for the enactment of the Act of December 23, 1913, and defeats justice in cases which do not affect foreign trade relations or rights of foreign governments requiring consideration.

This limiting interpretation in the case at bar is adopted, even though the law of Uruguay is not known, since in the case at bar it was neither pleaded, nor proven for the purpose of the motion for summary judgment, and in any event would under established rules of law present a triable issue of fact as to its existence and interpretation.

II

The Separate Entity Theory Established by Section 604 of Title 12 of the United States Code is Not Applicable to Single Transactions Originating at a Foreign Branch of a National Bank Requiring Performance Within the United States.

A copy of the receipt for the sight draft for $30,000.00 and its translation into the English Language is appended hereto. It appears that the sight draft was purchased, and the customer was charged 20 pesos and postage of 0.60 pesos for transmitting the order to New York.

Section 604 of Title 12 of the *United States Code* provides in part that "every national banking asso-

ciation operating foreign branches shall conduct the *accounts of each foreign branch* independently of the accounts . . . of its home office." It is respectfully submitted that the copy of the receipt for the sight draft shows on its face that the transaction involved the purchase of a draft drawn by the First National City Bank of New York at Montevideo on the First National City Bank of New York at New York. The transaction does not involve an "account" in the foreign branch but it involves an "account" at its New York office.

No action could have been brought at Montevideo for payment of the draft, the funds having been transmitted to New York.

It is respectfully submitted that even a liberal interpretation would not admit the application of the separate entity theory to a payment due and payable in New York whether the credit had its origin within the United States or in a foreign country.

In *Cable & Wireless vs. Yokohama Specie Bank* 79 N.Y.S. 2d 597, the facts are recited at page 599, as follows:

> *"On or about September 29, 1941, Yokohama Specie Bank, Ltd., a Japanese corporation having an agency in New York, drew, at Tokyo, a Bill of Exchange addressed to itself in New York. ."*

At page 604, the Court states as follows:

> "That a draft drawn by one person upon himself or itself is in effect a promissory note or an accepted bill, accepted by the very act of issuing it, and that presentment and acceptance

are not necessary to make the draft a liability of the drawer to the payee or holder, has been decided so many times and has been so widely recognized, both before and since the enactment of the Negotiable Instruments Law, that I would not have thought that any one could or would deny or question it." (Citing cases)

On page 608, the Court continues as follows:

"Those cases show that the implications of the view that a bank and its branches are one have not been carried by the courts to a dryly logical extreme; that the practical realities of the way in which the businesses of a bank with branches is carried on have been realized and viewed by the courts in a commendably realistic fashion. *But I do not find in those cases, individually or collectively, any support for or even a suggestion of the view that a draft drawn by a bank addressed to one of its branches is anything other than a draft drawn by the drawer upon itself so as to constitute an obligation or liability of the drawer from the moment of its issuance without any presentment to or acceptance by the branch to which it is addressed.*" (Emphasis added)

One of the precedents cited by the Court from a federal jurisdiction is *Pennsylvania R. Co. vs Brown* 6 Cir., 111 F. 2d 983. Over twenty state precedents are cited in addition to annotations, and it is respectfully submitted that the last quoted opinion presents the law on the issue in the case at bar.

It is respectfully submitted that it would require a strained interpretation of Section 604 of Title 12

of the *United States Code* to permit the application of the separate entity theory to the facts here presented, and it is not conceivable that Congress should have considered as one of the basic aims and purposes of this statute the application of payments due and payable in the United States from whatever source.

The gist of the action is the *ownership* of the note, and not its *possession*. Unless the Respondent denies the execution, the note having concededly not been negotiated, it would be unnecessary to introduce it in evidence at the trial, since it is under Respondent's control and in its possession.

12 Am. Jur. 2d 333.

Sec. 604 of Title 12 of the *United States Code* applies to cases which affect the relations of the United States with foreign governments, and it is respectfully submitted that it could not be said that the issue presented by the complaint in this action is more than a local matter affecting no one but Petitioner and Respondent.

III

No Person Has a Legal Claim or Attempted to Enforce Any Claim to This Sight Draft, Other Than Petitioner.

The sight draft was purchased by Helen Ham Phillips, mother of William Stanton Phillips, deceased, who died after Petitioner's decedent, leaving a son, Robert Phillips, surviving her, brother of Petitioner's decedent, who is a resident of California. Petitioner is a citizen of Peru, the widow of William Stanton Phillips, and the three minor children of decedent are United States citizens and residents of California.

Respondent is not amenable to the jurisdiction of the Federal Courts in California, and Robert Phillips, surviving son of Helen Ham Phillips, is not amenable to federal jurisdiction in New York. Robert Phillips has not seen fit, nor has his mother Helen Ham Phillips during her lifetime or the executor of her estate, to intervene in the pending action in New York.

In such a situation a New York statute is tailored to do justice to all parties making a legitimate claim in the situation presented in the case at bar.

Sec. 216 of Vol. 7B of the *Civil Practice Law and Rules* of New York reads in part as follows:

> "Action to recover money. 1. No action for the recovery of any sums of money due and payable under or on account of a contract, or for any part thereof, shall be commenced by any person who has made claim to the sum, after the expiration of one year from the giving of notice, as hereinafter provided, to the claimant that an action commenced by another person is pending to recover the sum, or any part thereof, exceeding fifty dollars in amount. This limitation shall not be construed to enlarge the time within which the cause of action of the claimant would otherwise be barred. 2. If any person shall make claim for the recovery of any sum of money due and payable under or on account of a contract, and an action has therefore been, or shall thereafter be, commenced by another person to recover the sum, or any part thereof, exceeding fifty dollars in amount, *the defendant in such action* may, within twenty days from

the date of service upon him of the complaint or from the date of receipt by him of the claim, whichever occurs later, *make a motion before the Court in which the action is pending* for an order permitting the defendant to give notice to the claimant that the action is pending. The court in which the action is pending shall grant the order where it appears that a person not a party to the action has made claim against the defendant or the sum of money, or any part thereof, exceeding fifty dollars in amount; that the action was brought within collusion between the defendant and the plaintiff; and that the claimant cannot, with due diligence, be served with process in such a manner as to obtain jurisdiction over his person."

Respondent relied on this section in the *Republic of China vs. National City Bank of New York*, C.A.N.Y. 1952, 194 F. 2d 170 where the Court made an order at the request of Respondent staying the suit for one year after notice of the pendency of the action to alleged adverse claimants was given.

Respondent did not avail itself of the New York statute in the case at bar, and the alleged adverse claimant refuses to intervene, resulting under the decision of the United States District Court and Court of Appeals in a stalemate of Petitioner's rights.

CONCLUSION

The inability of the federal courts to enforce Respondent's admitted obligation to pay a stated sum to Petitioner, or to *any one*, who may be entitled

thereto, demonstrates the need for the interpretation of Section 604 of Title 12 of the *United States Code* to a transaction originating at a foreign branch office of a national bank and requiring performance within the United States.

For the foregoing reasons and based upon the above cited authorities, Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

ERIC A. ROSE
Counsel for Petitioner

APPENDICES

APPENDICES

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
64 Civ. 3983

U. S. DISTRICT COURT
FILED
AUG. 21, 1970
3:15 P.M.
S.D. OF N.Y.

GABRIELLA F. PHILLIPS, As Administratrix of the Estate of WILLIAM STANTON PHILLIPS, Deceased,

Plaintiff,

-against-

FIRST NATIONAL CITY BANK OF NEW YORK,

Defendant.

Appearances:

Eric A. Rose, Long Beach, California, of counsel, Zalk, Rubel & Perret, New York City for plaintiff.

Shearman and Sterling, by Richard H. Troy, New York City, for defendant.

CANNELLA, J.

The defendant's motion for summary judgment, made pursuant to Rule 56 of the Federal Rules of Civil Procedure, is granted.

The facts in this case are undisputed. While in Montevideo, Uruguay in 1959, Mrs. Helen Ham Phillips, accompanied by her son - William Stanton Phillips, opened several accounts at the "First National City Bank of New York, Montevideo Branch" and also obtained a negotiable sight draft for $30,000, payable to the order of Helen Ham Phillips, drawn on the defendant's branch (and head office) located at 55 Wall Street, New York City. Thereafter, on July 29, 1959, this negotiable sight draft was exchanged for another such draft (No. 25959) also in the sum of $30,000 and drawn upon the New York City branch, but payable to the order of William Stanton Phillips.

On August 3, 1959, William died while still in Uruguay. Mrs. Phillips closed out the accounts in Montevideo and returned to the United States. Subsequently, William's estate and Mrs. Phillips both claimed that the $30,000 represented by the draft should be paid to them, but neither party possessed the draft nor presented it to the defendant for payment.

Until 1964, the draft was presumed lost or destroyed or possibly in the hands of a holder unknown to the bank or the parties. However, in the spring of that year, the draft was found in a safe deposit box of the Montevideo branch. Although all parties were notified of its location and the necessity to commence Uruguayan estate administration proceedings to recover it, no one has commenced such proceedings, and the draft apparently remains in Montevideo under the control of the Uruguayan au-

thorities, albeit physically located within the Montevideo branch.[1] Therefore, the draft has never been presented to the defendant for payment, nor does the plaintiff have possession of it.

Defendant asserts that the plaintiff must be a rightful holder and must present or exhibit the draft to it before payment can be made. Plaintiff, on the other hand, contends that the draft is really a type of promissory note not requiring presentment and that even if presentment were necessary, it has been "presented" since the draft is in the defendant's physical possession in Montevideo.

Since this transaction occurred prior to September 27, 1964, the Negotiable Instruments Law (NIL) and not the Uniform Commercial Code is applicable.[2] N.Y.U.C.C. §§10-101, 10-105 (1964). The NIL requires that the instrument be exhibited in all cases, whereas Section 3-505 of the UCC only requires such exhibition upon demand.[3] Section 134 of the NIL states that the instrument "must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it." Although a draft drawn on oneself may, in effect, be a promissory note or an accepted bill and thus make presentment or acceptance unnecessary to

1. Whether the draft is still in the same or another safe deposit box or whether it is located elsewhere in the bank is not clear. What is clear, however, is that the government of Uruguay, and not the bank, controls its movement and has the present right to possession.

2. It is not contested that New York law is applicable herein.

3. Since such a demand has been made, the result would be essentially the same.

charge the *drawer* with liability,[4] such is not the case herein. Technically, two separate and distinct banks are involved - one operating in compliance with Uruguayan law and the other in compliance with New York law. Thus, this draft was not one drawn by the defendant, which is the *drawee*, and presentment is therefore required according to the general rule. "Presentment of a note and demand of payment must be made by actual exhibition of the instrument itself, or at least the demand should be accompanied by some clear indication that the instrument is at hand, ready to be delivered and such must really be the case." *Gilpin v. Savage*, 201 N.Y.167, 170, 94 N.E.656, 660 (1911). See *Greco v. Lo Monte*, 162 N.Y.S.982 (Sup.Ct. 1917). More than a mere demand for payment, as was made here, is required.

In addition, the mere fact that the draft here in issue is physically located on the premises of the Montevideo branch is not a substitute for presentment of the draft to the drawee here in New York. Defendant does not "possess" the draft, nor does defendant even have a right to possession since the draft is not only located within a separate and distinct branch, but it is held there under the direction and control of Uruguayan authorities who apparently will not release it to anyone until a proper Uruguayan court order has been issued. In short, the Montevideo branch is the mere custodian of the draft for the government of Uruguay.

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4. See In re Pascal's Estate, 3 Misc.2d 136, 146 N.Y.S.2d 364 (Sup. Ct. 1955); Cable & Wireless, Ltd. v. Yokohama Specie Bank, 191 Misc. 567, 79 N.Y.S.2d 597 (Sup.Ct. 1948), modified, 278 App. Div. 752, 103 N.Y.S. 2d 1016 (1st Dep't 1951), aff'd, 304 N.Y. 574, 107 N.E.2d 75 (1952); NIL §214. But see Greco v. Lo Monte, 162 N.Y.S. 982 (Sup.Ct. 1917).

Therefore, the defendant is not liable to the plaintiff at this time since she has not presented the draft for payment, nor can she now do so. This does not mean, of course, that the defendant will never be liable to the plaintiff, but only that there is no liability at this time.[5] Plaintiff *may* be able to establish a right to possession and title of the draft. But that issue must be determined in ancillary estate proceedings in Uruguay; it is not the concern of this court.

Accordingly, the defendant's motion for summary judgment is granted, and the summons and complaint are dismissed.

So ordered.

Dated: New York, N.Y.

August 21, 1970.

JOHN M. CANNELLA
U.S.D.J.

JUDGMENT ENTERED 8/21/70
JOHN LIVINGSTON, *Clerk*

5. The defendant has stated several times in its papers "its basic obligation to honor the draft when presented for payment by the proper holder thereof." Defendant's Brief, p.6. See Defendant's Reply Brief, pp. 4-5.

APPENDIX II

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 476 — September Term, 1970.
(Argued March 9, 1971 Decided March 22, 1971.)
Docket No. 35343

GABRIELA F. PHILLIPS, as Administratrix of the Estate of WILLIAM STANTON PHILLIPS, Deceased,

Plaintiff-Appellant,

—against—

FIRST NATIONAL CITY BANK OF NEW YORK, a National Banking Association,

Defendant-Appellee.

Before:

HAYS and FEINBERG, *Circuit Judges*
and CURTIN, *District Judge.**

Appeal from order of the United States District Court for the Southern District of New York, John M. Cannella, *J.*, granting summary judgment to defendant in action to recover the proceeds of a negotiable sight draft.
Affirmed.

Eric A. Rose, New York, N.Y.
(Zalk, Rubel & Perret, on the brief),
for Plaintiff-Appellant.

* Of the Western District of New York, sitting by designation.

Richard H. Troy, New York, N.Y.
(Shearman & Sterling, on the brief),
for Defendant-Appellee.

FEINBERG, *Circuit Judge:*

Plaintiff Gabriela F. Phillips, administratrix of the estate of William Stanton Phillips, appeals from an order of the United States District Court for the Southern District of New York, John M. Cannella, *J.*, granting summary judgment to defendant First National City Bank of New York. The case grows out of a family dispute as to who is entitled to the proceeds of a negotiable sight draft issued in July 1959, almost 12 years ago. For reasons given below, we affirm the judgment of the district court.

The background of the dispute is as follows. In Montevideo, Uruguay, in 1959, Mrs. Helen Ham Phillips obtained from defendant's Montevideo branch sight draft No. 25555 for $30,000 payable to her order, drawn on defendant's head office located in New York City. The draft, along with $3,000 other consideration, was issued to Mrs. Phillips in exchange for a cashier's check in the amount of $33,000 payable to her order. A month later, the Bank issued sight draft No. 25959, the subject of this law suit, in exchange for sight draft No. 25555. The new draft was also for $30,000, but the named payee was not Helen Ham Phillips but her son William Stanton Phillips (plaintiff's decedent). The transaction was carried out by William upon the alleged authorization of his mother.

William, who was then 37, died in Uruguay five

days later. Since then, there has been a struggle between William's estate and his mother, each claiming the $30,000 represented by draft No. 25959. The dispute has been bitter, including charges that the mother's authorization for the second draft, now sued upon, was forged. For some years after William's death that draft could not even be found, but in 1964 the Bank's branch in Montevideo discovered it while opening safe deposit boxes for which the rent had gone unpaid. Since then the draft has remained in Uruguay pending estate proceedings there to claim the property.

Plaintiff filed the present action in December 1964, seeking payment of the draft. Mrs. Helen Ham Phillips died in June 1966, but her heirs and representatives have continued to assert her claim to the draft. The case limped along in the district court while settlement negotiations were attempted until an order of the calendar part brought matters to a head. Defendant Bank has recognized its basic obligation to honor the draft, but in view of the conflicting claims has refused to do so without a settlement between the contending parties, and without presentment of the instrument to it. The Bank eventually moved in the district court for summary judgment on the ground that the N.Y. Negotiable Instruments Law §134[1] required that the instrument be surrendered before the Bank could be called upon to pay. Since plaintiff concededly does not have the sight

---

1. Because the transaction involved here occured before the effective date of the Uniform Commercial Code, the Negotiable Instruments Law applies. N. Y. Uniform Commercial Code §§10-101, 10-105 (McKinney 1964).

draft, which is still in Uruguay, Judge Cannella granted summary judgment. The judge left open the possibility that at some future time the Bank might be liable to pay plaintiff if she established the right to possession of and title to the draft.

We affirm the order of the court below, but we must disavow any implied approval of the conduct of all the parties to date. As a result of the inability of the contending interests to agree on a settlement, the $30,000 has remained with the Bank for almost 12 years although the Bank concedes that someone is entitled to it. We would suggest that it is incumbent upon the Bank now to do more than sit back and leave the contending estates to their quarrel. Apparently both are amenable to judicial process in California, and the Bank should explore all further possible affirmative steps under state, federal or foreign law to obtain a judicial ruling as to which group is entitled to the $30,000 proceeds.

Judgment affirmed.

APPENDIX III

211a

Plaintiff's Translated Photocopy of Receipt for Sight Draft for $30,000

Form No. 2000 4-59

COPY FOR THE CLIENT

Not Negotiable

No. 25959 - First and second exchange.

FIRST NATIONAL CITY BANK OF NEW YORK
Montevideo
July 29, 1959

In accordance with your purchase, we have issued a Draft, we hereby detail, in this "no value copy", care of the First National City Bank of New York, New York.

U. S. 30,000.00

WILLIAM STANTON PHILLIPS, to his order.

It is thirty thousand only dollars of E.E.U.U. - it is 20 Pesos 60/100 m.n.

30,000 it is.

Rate of Exchange, com. 20 postage 0.60 - Total $20.60.

Bought by HELEN HAM PHILLIPS.

Montevideo, Uruguay

The First National City Bank of New York.

Teller.

SEAL OF THE FIRST NATIONAL CITY BANK OF NEW YORK BRANCH
Montevideo

CASHIER - 30 July 1959.

I hereby certify that this is a true translation from Spanish to English from original copy, to the best of my ability.

Linda Helgeson

LINDA HELGESON
Official Interpreter for the Superior and
Municipal Courts of the County of Los Angeles,
California.

BEST AVAILABLE COPY

212a

Plaintiff's Translated Photocopy of Receipt for Sight Draft for $30,000

COPIA PARA EL CLIENTE
NO NEGOCIABLE

Nº 25959

Primera de cambio únicamente ☐ Primera y Segunda de cambio ☐

Señores THE FIRST NATIONAL CITY BANK OF NEW YORK, Montevideo, JULY 29 1959

De acuerdo con vuestro pedido, hemos emitido un giro que detallamos en esta copia sin valor, a cargo de The First National City Bank of New York, New York. U. S. $ 30,000.-

WILLIAM STANTON PHILLIPS a su orden

Son: THIRTY THOUSAND ONLY Dólares de EE. UU.

son:veinte pesos con 60/100 m.n.

30,000 SON

CAIERO

Tipo de Cambio | Equiv. Mda. Loc. | Com. 20 | Franqueo 0.60 | Imp. | Total Descuento | $ 20.60

Comprado por: HELEN HAM PHILLIPS

MONTEVIDEO, URUGUAY.

THE FIRST NATIONAL CITY BANK OF NEW YORK
MONTEVIDEO

Cajero

Plaintiff's Translated Photocopy of Receipt for Sight Draft for $30,000

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS

AFFIDAVIT

LINDA HELGESON being first duly sworn, deposes and says: That she is an official interpreter and translator for the County of Los Angeles, State of California; That she is familiar with the English and Spanish languages; That she has translated the attached Bank Draft from Spanish to English; and that the foregoing is a true and correct translation of said document.

Linda Helgeson

Subscribed and sworn to before me this 20th day of November, 1968

~~HAROLD J. OSTLY~~ WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles

By R. Newton Deputy

CERTIFICATE

Upon the affidavit of LINDA HELGESON, the translator, I RAYMOND CHOATE Judge of the Superior Court of the State of California in and for the County of Los Angeles, which is a court of record, do hereby certify that the foregoing translation of the attached Bank Draft is a true and correct translation of the same from the Spanish language to the English language.

Dated: November 20, 1968

Raymond Choate

JUDGE OF THE SUPERIOR COURT

APPENDIX IV

Section 216 of Volume 7B of the *Civil Practice Law and Rules of New York*, the text being appended hereto, permits Respondent to obtain an Order from the Court in which the action is pending to give notice to all persons of the pendency of the action who may make a claim to the funds on deposit with Respondent and over whom otherwise jurisdiction could not be obtained, and to stay further prosecution for a period of one year from the giving of such notice after which period adverse claimants are precluded from recovery against Respondent, thereby protecting Respondent from dual liability.

Respondent is further protected from adverse claimants by the provisions of Section 213 of Volume 7B of the *Civil Practice Law and Rules of New York*, the text being appended hereto, providing for a period of limitations of six years for an action upon a contractual obligation or liability express or implied.

APPENDIX V

Section 213 of Volume 7B of the *Civil Practice Law and Rules of New York*:

"The following actions must be commenced within six years:

1. an action for which no limitation is specifically prescribed by law;

2. an action upon a contractual obligation or liability express or implied ;

3. an action upon a sealed instrument; . . ."

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Supreme Court, U.S.
FILED
JUL 20 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. ~~1855~~

GABRIELA F. PHILLIPS, As Administratrix of the Estate of William Stanton Phillips, Deceased,

Petitioner,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, a National Banking Association,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HENRY HARFIELD,
RICHARD H. TROY,
Attorneys for Respondent,
53 Wall Street,
New York, N. Y. 10005.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1855

GABRIELA F. PHILLIPS, As Administratrix of the Estate of William Stanton Phillips, Deceased,

Petitioner,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, a National Banking Association,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Jurisdiction

Petitioner seeks to establish jurisdiction upon the allegation that the Court of Appeals has decided an important issue of federal law under 12 U. S. C. §604. In the courts below petitioner never offered any interpretation of this statute or argued any explication thereof as a ground of decision. Petitioner's invocation of a federal statute at this juncture is simply an attempt to claim federal issue jurisdiction in this Court in order to permit a further rehearsal of the same state law arguments which were properly rejected below.

Statement of the Case

Petitioner sued to recover upon a negotiable instrument. The undisputed facts showed that petitioner was not the holder of the instrument, had not delivered it up for payment, and had not even joined as a party to the action the rival claimant who had furnished the consideration for the instrument. Under applicable state law both courts below found that petitioner had no cause of action.

The petition now before this Court is grounded upon an inaccurate and incomplete statement of the facts.[1] The facts were found by the District Court (Judge Cannella) as follows (App. 2a-3a):

> "The facts in this case are undisputed. While in Montevideo, Uruguay in 1959, Mrs. Helen Ham Phillips, accompanied by her son—William Stanton Phillips, opened several accounts at the 'First National City Bank of New York, Montevideo Branch' and also obtained a negotiable sight draft for $30,000, payable to the order of Helen Ham Phillips, drawn on the defendant's branch (and head office) located at 55 Wall Street, New York City. Thereafter, on July 29, 1959, this negotiable sight draft was exchanged for another such draft (No. 25959) also in the sum of $30,000 and drawn upon the New

[1] The undisputed facts appear at pages 174a-180a of the appendix before the Circuit Court, having been submitted by respondent pursuant to General Rule 9(g) of the District Court. On the specific factual issue of present control of the sight draft, it is sufficient to compare petitioner's misstatements on pages 2, 3, 10, 14 and 19 of the present petition with the judicial findings on the same point at pages 2a, 3a n. 1, 4a, 8a and 9a of petitioner's present appendix. Reference may also be made to the Counterstatement of the Facts, Counterstatement of the Issue and Counterstatement of the Nature of the Case at pages 1-7 of respondent's brief before the Court of Appeals.

York City branch, but payable to the order of William Stanton Phillips.

"On August 3, 1959, William died while still in Uruguay. Mrs. Phillips closed out the accounts in Montevideo and returned to the United States. Subsequently, William's estate and Mrs. Phillips both claimed that the $30,000 represented by the draft should be paid to them, but neither party possessed the draft nor presented it to the defendant for payment.

"Until 1964, the draft was presumed lost or destroyed or possibly in the hands of a holder unknown to the bank or the parties. However, in the spring of that year, the draft was found in a safe deposit box of the Montevideo branch. Although all parties were notified of its location and the necessity to commence Uruguayan estate administration proceedings to recover it, no one has commenced such proceedings, and the draft apparently remains in Montevideo under the control of the Uruguayan authorities, albeit physically located within the Montevideo branch.[1] Therefore, the draft has never been presented to the defendant for payment, nor does the plaintiff have possession of it."

"1. Whether the draft is still in the same or another safe deposit box or whether it is located elsewhere in the bank is not clear. What is clear, however, is that the government of Uruguay, and not the bank, controls its movement and has the present right to possession."

On these facts, established by the record and not disputed, the district court granted summary judgment dismissing the action, and the court of appeals unanimously affirmed.

Reasons for Denying the Writ

The case raises no open question of federal law and was correctly decided.

I

State law requires surrender of the instrument as a prerequisite to payment.

Section 134 of the Negotiable Instruments Law [2] requires that the instrument "must be exhibited to the person from whom payment is demanded, *and when it is paid must be delivered up to the party paying it*" (emphasis supplied).

The courts below properly held that petitioner's failure or inability to meet this state law requirement was fatal.[3]

II

The petition raises no important federal question.

As noted above, petitioner's asserted "federal" issue was not argued below. Quite apart from its untimely assertion, petitioner's asserted "federal" issue is irrelevant in any event. Petitioner concedes that she is not the holder of the instrument, has never delivered it up for payment and never furnished any consideration for the instrument; under the settled state law of negotiable instruments petitioner has no cause of action in the first instance.

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[2] "Because the transaction involved here occurred before the effective date of the Uniform Commercial Code, the Negotiable Instruments Law applies. N. Y. Uniform Code §§10-101, 10-105 (McKinney 1964)" App. 8a.

[3] "It is not contested that New York law is applicable herein." App. 3a, n. 2.

The arguments now advanced by petitioner do not present genuine issues of federal law but are simply a rehash of rejected state law remnants seasoned with liberal mention of 12 U. S. C. §604 to produce an appearance of federal flavor. Distilled to its essence, the petition is a restatement of the same diversionary state law arguments raised below. Before two courts below petitioner sought to distract attention from her lack of a cause of action by arguing that the case really rested on rules of evidence, statutes of limitation, interpleader statutes and other irrelevant technicalities. The same old arguments now appear under pilfered federal flag.

Petitioner's argument (Pet. p. 10) based upon the "separate entity" theory stems from petitioner's earlier diversionary argument about the need for presentment. Both arguments are completely irrelevant. The complaint was dismissed not upon the technical ground that failure to make presentment had discharged the drawer, but, rather, upon the more fundamental ground that petitioner was not the holder of the instrument and was not prepared to deliver it up for payment. This was the basis of respondent's motion and is simply and clearly stated in the opinion of the Court of Appeals:

> "The Bank eventually moved in the district court for summary judgment on the ground that the N. Y. Negotiable Instruments Law §134 required that the instrument be surrendered before the Bank could be called upon to pay. Since plaintiff concededly does not have the sight draft, which is still in Uruguay, Judge Cannella granted summary judgment. The judge left open the possibility that at some future time the Bank might be liable to pay plaintiff if she established the right to possession of and title to the draft" (App. 8a-9a).

In short, it is not an actual or putative interpretation of 12 U. S. C. §604 which leaves petitioner "without remedy" in this case (Pet. p. 13). Rather, it is petitioner's failure ever to have been an owner, purchaser, holder or deliverer of the instrument sued upon which has established that petitioner never had a cause of action.

Petitioner's further suggestion (Pet. p. 13) that respondent national bank "refuses to take any steps toward payment of its obligation" is irresponsible in light of the thoroughly documented history of attempts by respondent to facilitate settlement between the rival claimants in this family dispute. This suggestion is made in especially ill grace in light of the failure of petitioner's attorney to respond to or acknowledge in any way respondent's further offer of assistance made in the months since the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY HARFIELD,
RICHARD H. TROY,
Attorneys for Respondent,
53 Wall Street,
New York, N. Y. 10005.